

## **U.S. Fish and Wildlife Service's Role in Michigan's Wetland Permit Program**

Section 404 of the Clean Water Act of 1977, as amended (CWA) (33 U.S.C. 1344) regulates the discharge of dredged or fill material into waters (including wetlands) of the United States. Discharges are regulated through CWA permits issued by either the U.S. Army Corps of Engineers (Corps) and/or State agencies.

Section 404(g) of the CWA, and its implementing regulations (40 CFR Part 233), allows States to assume the regulatory authority for Section 404 when the U.S. Environmental Protection Agency (USEPA) determines that the State program is as stringent as the Federal 404 program. Michigan and New Jersey are the only states that have assumed administration of the CWA 404 Program. The Corps retains section 404 permitting authority in Michigan over traditionally navigable waters including the Great Lakes, connecting channels, other waters connected to the Great Lakes where navigational conditions are maintained, and wetlands directly adjacent to these waters.

The U.S. Fish and Wildlife Service's (USFWS) role in State 404 programs is prescribed in the CWA. The USFWS responsibilities are described in greater detail in the CWA implementing regulations (40 CFR 233) and agency policy guidance documents. Concerning State 404 Programs, the CWA statute includes specific provisions for the USFWS to review and provide comments on:

- (1) The adequacy of the State's 404 Program (33 U.S.C. 1344(g)(2)-(3)), which must be taken into account in when USEPA evaluates a State 404 Program (33 U.S.C. 1344(h)(1)); and
- (2) Applications for State 404 permits (33 U.S.C. 1344(j)).

### **USFWS Role in Reviewing Applications for State Permits**

The CWA implementing regulations (40 CFR 233.50) outline the USFWS role in the Federal review of applications for State 404 permits. For example, within 15 days of receiving notification, the USFWS must indicate to USEPA if it will have comments on the permit application and within 50 days, the USFWS should provide their evaluation and comments to the USEPA (40 CFR 233.50(b)). The final decision to comment, object or to require permit conditions are made by the USEPA (40 CFR 233.50(b)).

The regulations allow for the Federal review of State 404 permits to be waived for some types of discharges (40 CFR 233.51). The regulations also specify that for eight categories of discharges, the Federal review process cannot be waived, including "Discharges with reasonable potential for affecting endangered or threatened species as determined by FWS" (40 CFR 233.51(b)).

In addition to the regulations, the USEPA and Michigan Department of Environmental Quality (MDEQ) have signed a memorandum of Agreement that "...defines the federal and state roles in

carrying out the policies, regulations, and procedures necessary to administer the permit program established pursuant to Section 404....” The MOU specifies that the “USEPA, USACE, and United States Fish and Wildlife Service (USFWS) shall, pursuant to Section 404(j) of the CWA, review each permit application received by the DNRE [now MDEQ] except for those categories of discharges for which such review has been waived in accordance with Section 404(k) of the CWA.” The MOU provides additional detail concerning the eight categories of discharges that require Federal review in Michigan, for example “major discharges,” which are defined to include the following: affecting one or more acres of wetlands, new breakwaters/seawalls greater than 1,000 feet, enclosure of more than 300 feet of a stream, and relocation or channelization of more than 1,000 feet of a stream. As specified in the MOU, the USEPA must notify the MDEQ within 30 days, “if the USEPA does not intend to review the permit application.”

### **How is USFWS role different under a State-assumed vs. Federal 404 Program?**

The primary difference is that the Corps as a Federal agency is subject to section 7 of the U.S. Endangered Species Act (ESA). As such, the Corps as the “Action Agency” must determine if the proposed action may affect any threatened or endangered species. If a permitted action is likely to adversely affect listed species, the Corps must prepare a consultation package (e.g. Biological Assessment) that serves as the basis for formal consultation with the USFWS. Section 7 consultations are designed to assist Federal agencies in fulfilling their duty to ensure Federal actions do not jeopardize the continued existence of a species or destroy or adversely modify critical habitat. The ESA generally provides for the consultation process to be completed within 135 days. Through the Section 7 consultation process, an Action Agency and project proponents can be authorized for “incidental take” of listed species associated with the proposed action.

A State agency action is not subject to section 7. Therefore, the State agency and USFWS follow the roles defined in the CWA and its implementing regulations to protect endangered and threatened species. The USFWS assists the MDEQ in determining whether a discharge is required to have Federal review (e.g., is it a discharge “with reasonable potential for affecting endangered or threatened species...”). In addition, for all types of discharges that require a Federal Review (e.g., a “major discharge”), the regulations provide for a total of 50 days from notification for the USFWS to complete its evaluation and provide that information to the USEPA. The Federal Review provisions of the CWA 404 Program do not include any means to authorize “incidental take” of listed species associated with the proposed action. If incidental take will occur, the applicant must seek ESA authorization pursuant to a Habitat Conservation Plan and associated ESA section 10 permits.

The USFWS’ participation in the Federal Review process under the CWA State Programs is funded through the “Conservation Planning Assistance Program.” The USFWS section 7 consultations are funded through the “Endangered Species Program.” Although funded by

separate mechanisms, they both achieve the same outcome of protecting endangered and threatened species from the effects of projects authorized by a Federal law (i.e., CWA).

In 2012, the USFWS East Lansing Field Office assisted the MDEQ and USEPA with 60 evaluations concerning effects to listed species and the determination of whether a Federal Review was required. Of those 60, 10 ultimately were designated for formal Federal Review. In addition, the East Lansing Field Office reviewed 210 applications for 404 permits from the Corps in 2012.

### **Authorities**

When the Service reviews a 404 Permit application in addition to its responsibilities under the CWA, the Service also fulfills its obligations under other Federal laws:

#### **Fish and Wildlife Coordination Act (16 U.S.C. 661 et. seq.)**

“...whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or by any public or private agency under Federal permit or license, **such department or agency first shall consult with the United States Fish and Wildlife Service, ... with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development**” (16 U.S.C. 662 (a); emphasis added).

**“The Fish and Wildlife Coordination Act clearly requires the dredging and filling agency (under a governmental permit), whether public or private, to consult with the Fish and Wildlife Service, with a view of conservation of wildlife resources.** If there be any question as to whether the statute directs the licensing agency (the Corps) to so consult it can quickly be dispelled. Common sense and reason dictate that it would be incongruous for Congress, in light of the fact that it intends conservation to be considered in private dredge and fill operations (as evidenced by the clear wording of the statute), not to direct the only Federal agency concerned with licensing such projects both to consult and to take such factors into account.” Zabel V. Tabb, 430 F2d 199 (5th Cir. 1970). cert. denied 401 U.S. 910 (1972).

#### **Great Lakes Fish and Wildlife Restoration Act (16 U.S.C. 941 et seq.)**

The GLFWRA (section 941d) specifies “In administering programs of the United States Fish and Wildlife Service related to the Great Lakes Basin, **the Director shall** seek to achieve the

following goals: (1) Restoring and maintaining self-sustaining fish and wildlife resources. (2) Minimizing the impacts of contaminants on fishery and wildlife resources. (3) **Protecting, maintaining, and, where degraded and destroyed, restoring fish and wildlife habitat, including the enhancement and creation of wetlands that result in a net gain in the amount of those habitats.** (4) Stopping illegal activities adversely impacting fishery and wildlife resources. (5) Restoring threatened and endangered species to viable, self-sustaining levels. (6) Protecting, managing, and conserving migratory birds” [emphasis added].

#### **National Environmental Policy Act (42 U.S.C. 4321et. seq.)**

NEPA requires the disclosure of the environmental impacts of any major federal action significantly affecting the quality of the human environment. NEPA regulations (40 CFR 1503.1(a)) specifies that “After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall: (1) **Obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved or which is authorized to develop and enforce environmental standards.** The NEPA regulations (1503.2) further specify “Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved and agencies which are authorized to develop and enforce environmental standards **shall comment on statements within their jurisdiction, expertise, or authority.** Agencies shall comment within the time period specified for comment in Sec. 1506.10....”